IN THE

Supreme Court of the United States

October ~~March~~ Term, 1947
No. 657

UNITED STATES OF AMERICA, *ex rel.* FREDERICK HEINRICH WEDDEKE,

Petitioner,

against

W. FRANK WATKINS, as District Director of Immigration and Naturalization,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

Proceedings Below

The petitioner, Frederick Heinrich Weddeke, prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit, made and entered on the fourth day of February, 1948, affirming an order of the United States District Court for the Southern District of New York, made and entered on December 26, 1938, which order dismissed a writ of habeas corpus and remanded the petitioner to the custody of the respondent.

The petitioner, a German alien, on October 31, 1947, sued out a writ of habeas corpus to test the legality of his

detention in deportation proceedings at Ellis Island. Argument on the pleadings, consisting of the petition for the writ, the return thereto, and the traverse, was had in the motion part of the United States District Court for the Southern District of New York, Judge Simon H. Rifkind sitting, on December 19, 1947. Judge Rifkind, from the bench, directed the entry of an order dismissing the writ and remanding the relator to the custody of the respondent. No evidence was received by the judge and no opinion rendered by him. The Circuit Court of Appeals, upon petitioner's appeal, unanimously affirmed the order of the District Court. Its opinion appears at pages 27 to 36 of the record. This opinion has not yet been reported.

Jurisdiction

The order of the Circuit Court of Appeals was rendered and entered on the 4th day of February 1948 (R. 27). The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

Statement of Facts

The petitioner, a native and citizen of Germany, last entered the United States as a stowaway on December 9, 1926, without an immigration visa. He has never been admitted to this country for permanent residence. He is therefore subject to deportation under 8 U. S. C. Secs. 155 (a), 213, and 214.

The petitioner in 1927 was married to Philomena Serzo, at Far Rockaway, New York. His said wife is a citizen of

the United States by birth. There are six children of said marriage, all of whom are native citizens of the United States (R. 6). Petitioner therefore in the deportation proceeding invoked the provision of 8 U. S. C. Sec. 155 (c), authorizing the Attorney General to suspend deportation of an alien otherwise deportable, who proves good moral character for the past five years, if the Attorney General finds that such deportation would result in serious economic detriment to a citizen spouse or minor child of such deportable alien.

The petitioner on June 18, 1942, was upon his plea of guilty convicted by the County Court of Nassau County, New York, to from five to ten years in the penitentiary upon an indictment charging him with the crime of incest with his twelve year old daughter Anna. The petition for habeas corpus herein alleges that the petitioner was convicted as aforesaid in violation of the Fourteenth Amendment of the Constitution of the United States and of Art. 1 Sec. 6 of the Constitution of the State of New York; that petitioner was inveigled to plead guilty, without the advice of counsel, by persuasion of the District Attorney, and that said plea was made in confusion, despair, and without understanding of the nature of the charges (R. 6). The petition also alleges that the petitioner was innocent of the charges as shown by affidavits of petitioner's wife and his daughter, Anna, which are annexed to the petition (R. 12 to 15).

The petition for habeas corpus further alleges that petitioner was accorded a deportation hearing by an Inspector of the Immigration and Naturalization Service in

New York City on December 5, 1946, but that the relief of suspension of deportation, for which he had applied, was denied him on the ground that his conviction as aforesaid was proof of his bad moral character (R. 7).

The petition for habeas corpus further alleges that the deportation proceeding before the Immigration and Naturalization Service were unfair, arbitrary, capricious and contrary to law in that

(a) the conviction of the petitioner was obtained by false accusations on the part of his said wife and daughter, and by the importunities on the part of the District Attorney, and that the petitioner was cajoled into pleading guilty, though in fact he was innocent (R. 6 and 7);

(b) after his arrest under the warrant of deportation herein, petitioner made an application for a stay of deportation to the Immigration Service, so that he could re-open his conviction in the Nassau County Court or make a pardon application to the Governor of the State of New York, but that the Immigration and Naturalization Service, acting for the Attorney General, denied this relief, stating as a reason for such denial the severe nature of the crime of incest (R. 8);

(c) the Immigration Inspector in the deportation hearing of December 5, 1946, persuaded the petitioner to proceed without the advice of counsel and falsified the minutes of said hearing (R. 8 and 9);

(d) counsel of the petitoner had been refused an examination of the files of the Immigration Service prior to the institution of the hebeas corpus proceeding in the

District Court, contrary to Sec. 95.6 (e) Code of Federal Regulations (R. 9).

The traverse herein further alleges that the majority of counts of the indictment of petitioner had been without bases in law in that they were found without the corroborating evidence prescribed by section 2013 of the Penal Law of the State of New York and that the County Court should not have accepted the plea of guilty for that reason. (R. 20 and 21).

The government return denies none of these allegations, but takes the position that the petition for habeas corpus does not allege facts entitling the petitioner to the relief demanded by him.

It is contented on behalf of the petitioner that on the face of the pleadings this German alien, ignorant of our laws and safeguards of liberty, has been illegally deprived of his rights and of his liberty, and that the courts below erred grievously in denying him in this habeas corpus proceeding a hearing on the merits in which evidence to prove his allegations could be offered.

The Circuit Court of Appeals rendered a decision (R. 27 to 36) whose highlights are:

(1) (R. 35) That assuming all other prerequisites to the exercise of favorable discretion under 8 U. S. C. Sec. 155 (c) are present, it is no abuse of discretion, if a denial of suspension of deportation is predicated upon a judgment of conviction of a crime tainted with moral turpitude, even though it be alleged or proved that the judgment is a nullity because, for violation of constitutional rights, the convicting court had no jurisdiction.

A judgment void as aforesaid may be the sole basis of denying "good moral character", and the Attorney General or those to whom he delegated his powers, the Immigration Service, are justified in ruling "that they would not go behind the judgment of conviction * * *"

(2) (R. 36) That it was no legal error or abuse of discretion for the Immigration Service, after a warrant of deportation had been properly issued, to deny the petitioner's application for a stay of deportation, which was sought to enable him to apply to the Governor of the State of New York for a pardon or to bring legal proceedings to re-open the judgment of conviction.

(3) (R. 36) That the claims of procedural error in the administrative hearing (inducement to waive counsel, falsification of the minutes of the administrative hearing, refusal to let counsel examine the files) raised no issues in the present habeas corpus proceeding and did not entitle the petitioner to a vacation of the warrant of deportation, nor justify that he failed to attack the conviction as unconstitutional before the issuance of the warrant of deportation.

Questions Presented

It is on the basis of the foregoing opinion that this petition presents questions of constitutional and administrative law, and of protection of Civil Liberties, that far transcend the fate of the individual involved in this case. These questions are:

(1) Is a conviction lac[illegible] element of due process and therefore violative of th[illegible]rteenth Amendment of the Constitution, an absolute nullity?

(2) Is such nullity a nullity for all purposes, so that it may be invoked in a deportation proceeding in which favorable discretion has been denied on the ground that such void conviction is proof of bad moral character, or can the administrative agencies refuse to go behind such void judgment and declare themselves bound by it?

(3) Do the allegations in the petition: That in the (administrative) deportation proceeding the petitioner was induced to waive counsel; that the minutes of the hearing were falsified: that counsel of petitioner was refused examination of the files prior to the present habeas corpus proceeding; raise the issue of lack of due process of the administrative proceedings and nullify such proceedings?

(4) Was, in view of the irregularities of the deportation proceeding as alleged in the petition for habeas corpus, the issue of unconstitutionality of the conviction in the Nassau County court timely raised in an application to the Immigration Authorities after a warrant of deportation had issued?

(5) Was, in view of the issues raised by the petition and traverse, which were not controverted by the return of the government, the District Court justified in dismissing the writ of habeas corpus on the pleadings, i.e. without hearing the evidence which petitioner was anxious to offer?

Reasons for Granting Writ

1. The court below decided important questions of federal law, which have not been, but should be settled by this court to wit:

a. The Attorney General denied suspension of deportation to a person otherwise deportable on the ground that a conviction for incest in 1942 was proof of lack of good moral character.

Query: Does the petitioner's allegation that the conviction was unconstitutional raise a substantial issue of fact?

The decision hinges upon a construction of Section 155 (c), 8 U. S. C., where suspension of deportation is made discretionary with the Attorney General. It is contended that this discretion is illegally exercised in the negative if expressly based upon the fallacious ground of a conviction which petitioner claims was in violation of the U. S. and N. Y. constitutions and therefore a nullity.

The decision hinges further upon a construction of the Administrative Procedure Act of 1946 (see Point II of brief, ~~Subdiv. (f)~~, p. 14 below) which requires that administrative adjudications must be based on "substantial evidence". It is contended that an unconstitutional conviction is no "substantial evidence" of lack of good moral character.

b. The petition herein alleges that a number of events occurred in the administrative (deportation) proceeding which deprived the petitioner of due process in said proceeding.

Query: Is the administrative proceeding reviewable on this ground?

In view of the defects of the administrative proceedings (inducement by the inspector that petitioner waive counsel, falsification of minutes, denial of counsel's request to examine files), was petitioner's offer to prove the unconstitutionality of his conviction timely made by motion to reopen after a warrant of deportation had issued? (see Points IV and V of brief.)

There is apparently no decision of this court construing this phase of the pertinent Rules and Regulations of Title 8 of the Code of Federal Regulations.

2. The decree herein of the Circuit Court of Appeals for the Second Circuit is in conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit.

The Circuit Court of Appeals for the Second Circuit in the present case (R. 36) held:

> "* * * all the Immigration Service did in this case was to rule that they would not go behind the judgment of conviction, which they would have to do in order to justify suspension of deportation."

The Circuit Court of Appeals for the Seventh Circuit in *U. S. ex rel. Freislinger* v. *Smith*, 41 F. (2) 707, upon habeas corpus in a deportation case held that where a judgment of conviction of an alien was void, the alien would not be deported on the ground of such conviction. Said the Court by Sparks, C. J. (p. 708):

> "Thus we have a judgment which, under the Illinois authority cited, the court had no jurisdiction

to render, and it is void * * *. We think the judgment, under the Illinois authorities, is not only erroneous, but void * * *.

"But in the instant case Kappel has served almost four years under the void judgment, and by virtue of this service, under the Illinois law, it is too late to correct judgment. *People* v. *Whitson*, 74 Ill. 20 * * *.

"Judgment reversed, with direction to discharge Kappel."

It is contended therefore that the two decisions are contradictory with respect to the most crucial point of this case: Whether or not the Immigration Service has the duty of going behind a judgment of conviction which is claimed to be nullity on account of unconstitutionality.

The petitioner therefore prays for certiorari in accordance with Rule 5 (b) of this court.

New York City, March 8, 1948.

Respectfully submitted,

GUNTHER JACOBSON,
Counsel for Petitioner.

Supreme Court of the United States

March Term, 1948

No.

UNITED STATES OF AMERICA, *ex rel.* FREDERICK HEINRICH WEDDEKE,

Petitioner,

against

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioner has submitted a petition for a writ of certiorari, containing among other things statement of facts, of the opinion below, jurisdiction, questions presented, and reasons for granting the writ. Additional facts will be stated in the brief herewith presented.

POINT I

Where the petition for a writ of habeaus corpus and the subsequent pleadings present issues of fact, a plenary hearing has to be granted by the District Court at which the petitioner may offer evidence to prove his allegations.

In the present case, the writ of habeas corpus was dismissed by the District Court on the pleadings without a plenary hearing, although the following issues of fact had been raised:

(1) That petitioner had been defrauded and cajoled into pleading guilty to the crime of incest in 1942, without the assistance of counsel, and although he was innocent of the crime with which he had been charged.

(2) That in the warrant proceedings for deportation he was denied suspension of deportation on the ground that the said conviction proved his lack of good moral character.

(3) That he was denied a stay of deportation for which he had applied so that he would be able to reopen the criminal case.

(4) That he was persuaded by the Immigrant Inspection to waive counsel, that the minutes of the Immigration hearing had been falsified, that, subsequently, petitioner's counsel was denied access to the files of the Immigration and Naturalization Service.

Assuming that these allegations raised relevant and material issues in the habeas corpus proceeding, the District Court should have held a plenary hearing. This was mandatory under the decision of this Court in which it was held, in *Walker* v. *Johnston*, 312 U. S. 275, by Mr. Justice Roberts:

> "The District Court proceeded to adjudicate the petitioner's rights to the writ upon the allegations of his petition and traverse and those of the return and accompanying affidavits. Thus the case was disposed on *ex parte* affidavits and without the taking of testimony. The practice thus to dispose of application of habeas corpus on matters of fact as well as of law has been followed in the Ninth and Tenth Circuits.
>
> "In the other circuits, if an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received. This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statute that the judge shall proceed to determine the facts of the case, by hearing the testimony and arguments."

POINT II

The Administrative Procedure Act enlarged the power of the courts to review administrative decisions of the Immigration and Naturalization Service.

Court review of deportation proceedings is now regulated by the Administrative Procedure Act of June 11, 1946. That the said act applies to proceedings in the Immigration and Naturalization Service, is apparent from House Report No. 1980 of May 3, 1946, of the House Committee on the Judiciary, United States Code Congressional Service, 1946, page 1199, which expressly states that "The Department of Justice (Immigration and Naturalization Service)" was one of the agencies studied by the committee when it prepared the bill which subsequently became the Administrative Procedure Act. Reference is also made to the definitions contained in section 2 of said act reading:

> "Sec. 2. As used in this act—
>
> "(a) Agency—'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, the governments of the possessions, territories, or the District of Columbia * * *."
>
> * * *
>
> "(f) Sanction and relief.— 'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimburse-

ment, restitution, compensation, costs, charges of fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

"(g) Agency proceeding of action.— 'Agency proceeding' means any agency process as defined in subjections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

Two things are clear on the face of this section: That deportation proceedings are embraced therein and that "agency action" and "agency proceeding" under subsection (g), just quoted, comprises any kind of relief denied including "discretionary relief".

The problem of Judicial Review is dealt with in Sec. 10 of the Act, reading in part:

"(e) Scope of review.— So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, ca-

pricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; (6) unwarranted by the facts to the extent that the facts are subject to trial to move by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The Court will notice that the courts have power to set aside agency action, findings and conclusions found to be

(1) arbitrary, capricious, *an abuse of discretion;*

* * *

(4) without observance of procedure required by law;

(5) unsupported by substantial evidence * * *;

(6) unwarranted by the facts.

The Court will notice that the abuse of discretionary powers is subject to court review, and it is contended that discretionary powers are abused where, as in the present instance, discretionary relief is denied on untenable grounds. The petition herein alleges under 8 (R. 7): "Suspension of deportation was denied him (petitioner) on the ground that his conviction as aforesaid is proof of the bad moral character." It alleges specific facts showing that his (petitioner's) plea of guilty was obtained from him

by tricks and undue influence. It alléges that the petitioner was willing to prove his innocence of the crime charged, and affidavits of petitioner's wife and daughter were submitted showing that the charges brought by them, six years ago, against this relator were false and untrue. If the conviction was unconstitutional and a nullity as it is claimed (see Point IV below), the decision of the Board of Immigration Appeals is based on incompetent evidence, and should be set aside.

In this connection it seems proper to refer to the scope of court review of an administrative decision as enlarged by the Administrative Procedure Act. The Court's attention is directed to Judge Holtzoff's decision in *Lindenau* v. *Watkins,* 73 F. Supp. 216, 219, reading:

> "In other words, the Administrative Procedure Act does not in any way modify the existing forms of proceedings to review final actions of administrative agencies, nor does it create any new remedies if an adequate remedy is in existence.
>
> "A different question, however, is presented in dealing with the scope of review as distinguished from the nature of the remedy. Section 10 (c), which governs this matter, reads as follows:
>
> "'(c) Scope of review. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings and conclusions, and abuse of discretion,

or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction authority, or limitations, or short of statutory right; (4) without observance of procedure acquired by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.'

"(2) The vital provision of the foregoing section, for the purpose of this proceeding, is found in Clause (5) which empowers the court to determine whether the findings of fact made by the administrative agency are supported by substantial evidence, and to set them aside if its conclusion is in the negative. The statute contains no exception to this provision. Consequently, in those cases in which the scope of judicial review had been restricted within narrower bounds, it was enlarged to that extent. In reviewing administrative findings, the court must always determine whether the findings are supported by substantial evidence. It is no longer sufficient, as has been true in some instances, that the findings be supported by some evidence. The result is that in habeas corpus proceeding to review a deportation or exclusion order of the immigration authorities, it is not enough that there be some evidence to sustain the findings of fact. They must be supported by sub-

> stantial evidence. If the court reached the conclusion that there is no substantial evidence to sustain the findings, they must be set aside."

The decision further holds:

> "The following principles may be deduced from the foregoing authorities: Substantial evidence is evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference of fact which is sought to be sustained. It implies a quality of proof which induces conviction and which makes a definite impression on reason. It must be more than a scintilla of evidence, and more than suspicion or surmise. It must be more satisfying than hearsay or rumor. Mere rags and tatters of evidence are not sufficient. Some courts have gone as far as to say that evidence subject to either one of two inferences is not substantial. The test in determining what constitutes substantial evidence in an administrative proceeding, is the same as that applied in trials by jury."

On the basis of these principles, it is submitted that the decision of the administrative agencies is unsupported by substantial evidence in that it considered a conviction which was unconstitutional and a nullity and in that an unverified hearsay report of a probation officer (petition, par. 9e (R. 9)) was used as evidence on which however the decision of the administrative agencies was not based. In addition to this the other defects of the deportation proceeding, alleged in this petition, which are not denied in the government return, should be considered.

It follows that the warrant of deportation herein should be set aside if court review shall reveal that the decisions of the administrative agencies were unsupported by substantial evidence.

POINT III

Inducement by the presiding inspector of the Immigration and Naturalization Service that the deportee waive counsel, falsification of the minutes of the hearing before the inspector, refusal of the Service to let counsel examine the files, are sufficient cause to set aside a Warrant of Deportation based upon such proceeding.

The Circuit Court, with respect to the allegations of the petition summarized in the caption of this point held, at the end of its decision (R. 36):

> "Appellant has made certain other claims of procedural errors in the administrative hearing. We have considered them, and find them without merit."

In opposition to this holding the Court is respectfully referred to the following sections of the Code of Federal Regulations, Title 8, as amended and republished on July 30, 1947, in the Federal Register of July 31, 1947, p. 5065, *et seq.* It is there provided in section 150.6 (c):

> "Procedure; notice of charges. At the beginning of a hearing under a warrant of arrest, the presiding inspector shall * * * (2) apprise the alien, if not represented by counsel, that he may be so represented if he desires and require him to state then and there for the record whether he desires counsel; * * *"

It is respectfully submitted that the allegation of the petition for habeas corpus that the inspector persuaded the petitioner to waive counsel is material and relevant and raises, if denied, an issue of fact. The government return

fails to deny this allegation. On the basis of this allegation alone the petitioner should have been granted a new warrant hearing.

Said Code of Federal Regulations, Title 8, further holds in Section 150.6 (b):

> "The presiding inspector * * * shall further make sure that * * * the record is a verbatim record report of everything that is stated during the course of the hearing * * *."

It is submitted that the allegation of the petition for habeas corpus that the record is untrue raises a material issue of fact which, if proved, ought to lead to a vacation of the warrant of deportation and to the granting of a new warrant hearing. Again the government return herein does not deny this allegation of the petition.

Said Code of Federal Regulations, Title 8, further holds in section 95.6 (b):

> "During the time a case is pending the attorney or representative of record, or his associates, shall be permitted to review the record and, upon request, be lent a copy of the testimony adduced * * *."

The petition for habeas corpus herein (R. 9) alleges that the petitioner never was given a copy of the minutes of the deportation hearing although he had asked for one on December 5, 1946, and that the undersigned attorney was refused permission to examine the record of the Immigration Service. At that time the case was "pending" before the Service as the petitioner was in custody at Ellis Island for deportation and applications to reopen and for a stay

of deportation were pending. The application for stay of deportation was made pursuant to Section 1.42 (e) of the Code of the Federal Regulations, and the application to reopen pursuant to Section 150.8 of the Code of Federal Regulations, Title 8.

It is submitted that this allegation again charges a substantial violation of procedural rights, which is based on more than the alien's word: on the sworn statement of the undersigned that he was refused review of the record. The government return does not deny these charges.

All these allegations sum up to the distressing fact that the Immigration and Naturalization Service committed said violations of its own Rules and Regulations to such extent that an improper zeal to deport this petitioner without due process is exposed.

This Court is prayed to restore justice to this indigent German.

POINT IV

A judgment of conviction in violation of constitutional rights is a nullity for all purposes, and a finding of the Immigration Authorities that a deportee failed to prove good moral character, if based upon such illegal conviction, must be set aside in a habeas corpus proceeding.

A.

That a judgment of conviction in violation of constitutional rights is a nullity has been established by the decisions of this Court and of the courts of the State of New York.

In *Canizio* v. *People of the State of New York*, 327 U. S. 82, 66 S. Ct. 452, the petitioner equally invoked Article 1,

Section 6 of the Constitution of the State of New York and the Fourteenth Amendment to the United States Constitution, alleging in a motion, *coram nobis,* that he had been convicted of robbery in the first degree upon his plea of guilty, without the advice of counsel and without being advised of his right to counsel. This Court, by Mr. Justice Black rendering the opinion of the Court, held on page 85:

> "* * * had there been nothing to contradict petitioner's general allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced, his charges would have been such as to have required the Court to hold a hearing on his motion."

In other words the allegations in Canizio's motion papers were held such as to vitiate the conviction and make it a nullity, had they been uncontradicted (as they are in this case).

Mr. Justice Murphy, in his dissenting opinion on page 89, ibid., similarly states that where a conviction was had without due process and in violation of both the Fourteenth Amendment and of Article 1, Section 6, New York Constitution:

> "The arraignment and the plea of guilty were thereby vitiated, from which it follows that the conviction was inconsistent with due process of law."

Similarly this Court in *Brown* v. *State of Mississippi,* 297 U. S. 278, 56 S. Ct. 461, on page 287, by Mr. Chief Justice Hughes, unequivocally held:

> "The conviction and sentence were void for want of essential elements of due process, and the pro-

ceedings thus vitiated could be challenged in any appropriate manner."

The petitioner herein therefore concludes that, upon the uncontradicted allegations of the petition for habeas corpus, the alleged facts showing that his conviction in 1942, of the crime of incest was void, that it could be challenged in any appropriate manner, and that it was appropriate to challenge it in the deportation proceeding and subsequently in this habeas corpus proceeding in the Federal Courts. The holding of the Circuit Court here is, that the Immigration Service in adjudicating petitioner a person who failed to show good moral character did not have to go behind the (void) judgment of conviction, is erroneous.

B.

Inasmuch as the judgment of conviction herein is a decision of a court of the State of New York, it seems appropriate that to show that, upon the allegations of the petition for habeas corpus herein which were not contradicted by the return of the government, the judgment of conviction was also void under New York Law.

Article 1, Section 6, paragraph 3 of the Constitution of the State of New York, as amended on November 8, 1938, reads:

> "No person shall be deprived of life, liberty or property without due process of law."

Reference is further made to the case of *Lyons* v. *Goldstein,* 290 N. Y. 19, where the Court of Appeals of the State of New York considered the question whether a judgment of conviction could be set aside, after the times to

appeal had expired, where a person restrained of his liberty under such judgment (p. 23):

> "asserts that the judgment is null and void because his plea of guilty to the crime charged, which forms the basis upon which the judgment was entered, was induced by bribery, deceit, coercion or fraud and misrepresentation * * *."

The Court of Appeals decided that such assertion could properly be made, citing with authority, among other cases, the decisions of this court in *Mooney* v. *Holahan,* 294 U. S. 103, 55 S. Ct. 340; *Walker* v. *Johnston,* 312 U. S. 275, 61 S. Ct. 574; and *Waley* v. *Johnston,* 316 U. S. 101, 62 S. Ct. 964.

It therefore is apparent that the law of the State of New York is exactly in conformity with the construction given the due process clause of the Fourteenth Amendment by the decisions of this court.

C.

Having thus established that a judgment of conviction in violation of constitutional rights is a nullity, it is still left to show that the petitioner may still attack such void judgment of a state court in a habeas corpus proceeding challenging the validity of a warrant of deportation based on such void judgment. This question has been answered in the negative by the Circuit Court of Appeals, Second Circuit, in the present case while the U. S. Circuit Court of Appeals, 7th Circuit, in the case of *U. S. ex rel. Freislinger* v. *Smith, supra,* p. 9, answered it in the affirmative.

The main reason why the decision of the Circuit Court for the Seventh Circuit should be sustained is that the petitioner has served his sentence, and being released from

jail can possibly no more have recourse to habeas corpus or *coram nobis* proceedings in the State Courts. Furthermore, in order to proceed in the state courts the petitioner needs time and release from his present custody. If he is shipped out of the country before he can carry through such proceedings that may extend over a year or more, he is practically deprived of these remedies in the state courts. The petition for habeas corpus herein (R. 8), expressly alleges that the petitioner requested the Immigration Service to stay deportation so that he might pursue his state remedies, and that this request was denied because of the severe nature of the crime with which petitioner was charged. The present habeas corpus proceeding was therefore the only remedy open to the petitioner in which he could attack the unconstitutional conviction. The holding herein of the Circuit Court for the Second Circuit that the Immigration Service did not have to go behind the allegedly void conviction therefore deprived the petitioner of his right under the constitution.

POINT V

The nullity of the conviction may be raised in deportation proceedings after the deportation hearing.

The decree of the Circuit Court herein further holds that (R. 34):

> "It cannot be said that the Immigration Service acted arbitrarily or capriciously in the exercise of a discretionary power by refusing to suspend deportation in the face of a judgment of a court of competent jurisdiction, convicting the alien, upon a plea of

> guilty, of the crime of incest within the five-year period; at least if the alien made no offer at the hearing conducted by the Immigration Service to prove the judgment of conviction was void as the result of denial to the alien of his constitutional rights at the original trial."

The Circuit Court in this part of the decision overlooked the fact that the petition for habeas corpus herein alleges quite clearly that the petitioner in the deportation hearing was again persuaded to proceed without counsel and that other violations of due process were committed in the deportation proceeding, so that said proceeding is also a nullity. The petition for habeas corpus further alleges that when counsel for the petitioner finally raised the issue and asked for a stay of deportation and examination of the files, these applications were denied. Under the circumstances of the case therefore, it must, on the face of the pleadings, be held that they entitle the petitioner to relief by writ of habeas corpus.

If it shall still be found that here or there a fact should have been alleged more explicitly in the pleadings, the petitioner invokes the holding of this court in *Holiday* v. *Johnston,* 313 U. S. 342, 350, 351, 550; 61 S. Ct. 1015:

> "A petition for habeas corpus ought not to be scrutinized with technical nicety. Even if insufficient in substance, it may be amended in the interest of justice."

The proceedings before the Immigration and Naturalization Service are administrative and not supervised and directed by learned judges. Mistakes in complex cases are made by government officials and by aliens. The Rules and

Regulations of the Service anticipate such human shortcomings and provide for them. The court's attention is respectfully directed to the following sections of Title 8 of the Code of Federal Regulations:

Section 1.42, giving the Commissioner of Immigration power to grant:

> "(e) Requests for stay of execution of a warrant of deportation;"

Section 150.8:

> "Reopening the hearing. At any time prior to the forwarding of the record of hearing to the Commissioner the office in charge of a district or suboffice may direct that a case be reopened for proper cause. The Commissioner may direct a reopening of the record of hearing for proper cause at any time prior to such time as an appeal from his order may be entered in accordance with the provisions of Section 90.3 (a) of this chapter. Requests by aliens or their representatives for a reopening of a hearing prior to entry of a final order shall be in writing, stating the new facts to be proved, and be supported by affidavits or other evidentiary material. All requests for reopening must be filed with the appropriate field office of the Immigration and Naturalization Service. If the record of hearing has been forwarded to the Commissioner from that office, the request for reopening shall be forwarded to the Commissioner. The Commissioner shall grant or deny the request if the case is pending before him. If the case is pending before the Board of Immigration Appeals, the request shall be forwarded to the Board. The Board shall consider the request and either remand the case for further hearing or deny the request and render a decision on the record."

Hearings may be reopened, it appears, at all stages of the proceeding.

Further provisions for the reopening of cases are contained in Section 90.11 (b) reading:

> "Reconsideration or reopening of any case in which an order has been entered by the Board of Immigration Appeals (except as provided in Section 150.11 b of this chapter) * * *, whether requested by the Commissioner or by the party against whom the order is effective or his counsel or representative, shall be only upon written motion. The Board may, in its discretion, grant or deny such motion, and pending its consideration of the motion may stay deportation. A motion to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. A motion to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent. Motions shall be filed in triplicate with the Board of Immigration Appeals. If oral argument upon a motion is desired, it shall be so stated. The Board of Immigration Appeals, in its discretion, may grant or deny oral argument."

The petitioner, as alleged in the petition for habeas corpus, had been deprived of due process in the deportation proceeding. As soon as apprised of his rights by employment of counsel, he could move to have his proceeding reopened. Such motion was timely made after an order had been entered by the Board of Immigration Appeals (*supra,* Section 90.11), where he could not present his case properly before such order was made because he had been deprived of due process.

POINT VI

The application for a writ of certiorari should be granted.

This Court has granted certiorari in cases involving civil right where important questions of constitutional law are involved. Said this Court in *Canizio* v. *The People of the State of New York,* 327 U. S. 82, 66 S. Ct. 699:

> "We granted certiorari because the case presents an important question involving the right to counsel under the Constitution of the United States."

The petitioner invokes this rule in his behalf in addition to the further rule of this Court that it will set at rest conflicts of decision between the Circuit Courts of Appeal.

The petitioner, having gone through a criminal proceeding and court review of the deportation proceeding without ever having been heard on the merits, prays for his day in court.

Respectfully submitted,

GUNTHER JACOBSON,
Counsel for Petitioner.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 657

UNITED STATES OF AMERICA, EX REL. FREDERICK HEINRICH WEDDEKE, PETITIONER

v.

W. FRANK WATKINS, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 27-36) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 4, 1948 (R. 37). The petition for a writ of certiorari was filed March 8, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the immigration authorities acted arbitrarily in finding that petitioner, an admittedly deportable alien, failed to establish good moral character during the five years preceding the institution of deportation proceedings, such proof being a necessary condition of favorable exercise of their power to suspend deportation in economic hardship cases, where during such five-year period he had been convicted on his plea of guilty of incest with and rape upon his twelve-year-old daughter.

2. Whether the deportation proceedings were fair.

STATUTE INVOLVED

8 U.S.C. 155 (c) provides in pertinent part:

> In the case of any alien [with exceptions not material] who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may • • • (2) suspend deportation of such alien if not racially inadmissible or ineligible to naturalization in the United States if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien. • • •

STATEMENT

Petitioner is a German alien who entered the United States as a stowaway in 1926; he is therefore, admittedly, subject to deportation under 8 U.S.C. 155(a), 213(a), and 214 (Pet. 2). The following facts are also undisputed: In June 1942, petitioner was convicted in a New York state court, on his plea of guilty, of acts of incest with and rape upon his then twelve-year-old daughter, the charges having been brought by his wife and corroborated by the daughter, and he was sentenced to imprisonment for five to ten years (R. 6). Upon his release from the penitentiary on parole

in September 1945, he was arrested under an immigration warrant charging him with being subject to deportation on the ground of having entered the country illegally (R. 18, 29). On December 5, 1946, he was accorded a hearing before an immigrant inspector, who, at the conclusion of the hearing, recommended that he be deported on the charge contained in the warrant of arrest (R. 7, 18). On April 15, 1947, the Commissioner of Immigration and Naturalization ordered him deported. On April 18, 1947, the Board of Immigration Appeals affirmed the Commissoner's order, and on the same day a warrant directing petitioner's deportation to Germany was issued. On October 13, 1947, petitioner's motion for a stay of deportation, which had been filed on an undisclosed date following issuance of the deportation warrant, was denied by the Commissioner. Petitioner is in the custody of respondent under the deportation warrant. (R. 19.)

On or about October 27, 1947, petitioner's attorney, whom he had retained, apparently, on or about October 24, 1947 (see R. 5, 12, 13), filed on behalf of petitioner in the District Court for the Southern District of New York a petition for a writ of habeas corpus challenging the legality of his detention (R. 5-11). The allegations of the petition were made on information and belief with the exception of one statement (see R. 9), which the attorney made of his own knowledge (R. 5). The petition alleged that petitioner's plea of guilty to the incest-rape charges was made without the advice of counsel and that he "did not expressly waive counsel, but in his consternation and confusion about the horrible charges brought against him by members of his family, upon the importunities of the District Attorney who advised him not to make any fuss, pleaded guilty. * * * Said plea was made in confusion and despair and without understanding on the part of the relator of the nature of

the charges" (R. 6). The petition further alleged that, upon his release from the penitentiary, petitioner "was arrested by the Immigration and Naturalization Service for deportation, and after a hearing held * * * on December 5, 1946, before Inspector Warren A. Mueller, he was ordered deported by a decision of the Board of Immigration Appeals, and he is held for deportation on or about October 30th, 1947. Suspension of deportation was denied him on the ground that his conviction as aforesaid is proof of his bad moral character. In view of relator's offer to prove his innocence of the crime of which he was charged, this finding is unjust and arbitrary" (R. 6-7).

The petition further alleged that the "hearing [of December 5, 1946] and the proceedings herein had in the deportation case" were "unfair, arbitrary, capricious and contrary to law" for the following reasons:[1] (1) Petitioner "never committed the crime of incest with his daughter, of which he had been charged.[2] * * * Said charges of his wife and daughter were made unjustly and untruthfully, in order to get the relator out of the house. * * * The relator has requested the Immigration Service to stay deportation so that he can either open the proceedings in the County Court, for Nassau County, New York, in which he was convicted, or make a pardon application to the Governor of the State of New York, which would wipe out his conviction. However, the Immigration Service refused to grant him the opportunity of doing so, stating as a reason for its refusal of doing so the severe nature of the

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[1] Among others which are evidently no longer relied upon (see (b) and (c), R. 8).

[2] Affidavits of petitioner's wife and daughter, both dated October 25, 1947, stating that their charges against him had been falsely preferred, were attached to the petition (R. 12-15).

crime" (R. 7-8);[3] (2) the immigrant inspector who conducted the hearing of December 5, 1946, "indicated to the Relator that it was not necessary to have counsel at the hearing and thereby induced the relator to proceed at the hearing * * * without counsel" (R. 8);[4] (3) "At the said hearing of December 5th, the presiding Inspector of the Immigration Service, Mr. Mueller, stated in the record that the relator should read the report of a Probation Officer, which was marked Exhibit 5, and that relator should state whether the report was substantially true. Relator answered 'yes' meaning that he would read the report, but it was taken away by the inspector before he read it and relator was not given a chance to examine said report and he never read same, and the report is untrue. As the minutes of the hearing stands, it may be misconstrued as if relator confirmed the veracity of the Exhibit 5, while he only said that he was willing to read it. Relator had no previous opportunity of correcting this ambiguity, as he never had been given a copy, although he had demanded a copy of said record at the hearing of December 5, 1946" (R. 9); (4) "The undersigned attorney has not been given an opportunity of examining the record of the Immigration Service, although demand therefor has been made on October 24, 1947, except that a copy of the minutes of the hearing of December 5, 1946, of the findings of the presiding

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[3] The petition did not state when the application for stay of deportation was made, but it clearly must have been made after April 18, 1947, when the warrant of deportation was issued. See 8 C.F.R., 1943 Cum. Supp., 150.12(e), providing for discretionary stays of deportation, after deportation has been ordered, where "some serious emergency arises, or where new and material evidence is discovered." The application was denied on October 13, 1947 (R. 19).

[4] It is provided in 8 C.F.R., 1943 Cum. Supp., 150.6(e), that "At the beginning of a hearing under a warrant of arrest, the presiding inspector shall * * * (2) apprise the alien, if not represented by counsel, that he may be so represented if he desires and require him to state then and there for the record whether he desires counsel * * *."

Inspector and of the decision of the Board of Immigration Appeals of October 13th [*sic:* April 18, 1947?], have been handed to the undersigned on October 24, 1947" (R. 9).

A writ of habeas corpus was issued on October 31, 1947 (R. 3-4), respondent filed a return (R. 16-19), and petitioner filed a traverse (R. 20-21).[5] On December 26, 1947, following argument on the pleadings, no testimony being adduced, the writ was dismissed and petitioner was remanded to respondent's custody (R. 22-23). On appeal to the Circuit Court of Appeals for the Second Circuit, the order of the district court was affirmed (R. 37).

ARGUMENT

1. Under 8 U.S.C. 155(c), *supra*, p. 2, the Attorney General is given discretionary power to suspend the deportation of a deportable alien "who has proved good moral character for the preceding five years" if the alien is not racially inadmissible or ineligible for naturalization and if his deportation would result in serious economic detriment to a legally resident spouse, parent, or minor child. Proof of good moral character within the five-year period is thus a condition of the exercise of the discretionary power conferred. Petitioner contends that the immigration authorities, to whom this discretionary power of the Attor-

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[5] The traverse was actually in the nature of an amendment of the petition. It alleged that the incest-rape indictment charged petitioner with three criminal acts committed in December 1941, January 1942, and May 1942; that two of the alleged acts were without evidentiary support; that only the daughter's uncorroborated charges supported the third act, petitioner's wife having stated to the prosecuting authorities that she never witnessed any criminal acts; and that since there was no basis for the majority of the counts, the court should not have accepted a plea of guilty.

ney General has been delegated,[6] acted arbitrarily and abused their discretion in accepting his conviction of incest-rape in 1942 as proof of his lack of good moral character during the five-year period, in consequence of which they declined to exercise favorably to him their discretionary power to suspend deportation (Pet. 7, 8, 22-26). The contention is, we submit, without merit.

We assume in the following discussion, as did the circuit court of appeals (R. 32), that since the Attorney General has set up a quasi-judicial procedure for the determination of issues bearing on the propriety of exercising his power to suspend deportation under 8 U.S.C. 155(c),[7] the alien is entitled to procedural due process in the conduct of such hearing, and that if the alien, though admittedly subject to

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[6] The Attorney General has delegated his authority to deport or suspend deportation to the Immigration and Naturalization Service (8 C. F. R., 1943 Cum. Supp., 90.1), reviewing power being lodged in the Board of Immigration Appeals (id., 1945 Supp., 90.3(a) (2)) and ultimately in the Attorney General himself (id., 1945 Supp., 90.12).

[7] An alien who is charged with being subject to deportation is accorded a hearing before an immigrant inspector known as the presiding inspector to determine whether he is subject to deportation as charged (8 C.F.R., 1943 Cum. Supp., 150.6(a), (b)). The presiding inspector is required to apprise the alien, *inter alia*, of his right to apply for suspension of deportation if found deportable (id., 150.6(c)). At any time during the hearing the alien may give notice that he wishes to apply for such suspension (id., 150.6(g)). At the conclusion of the hearing the presiding inspector prepares a memorandum setting forth a summary of the evidence, his proposed findings of fact and conclusions of law, and a proposed order respecting deportation (id., 150.7 (a), (c)). If the alien has applied for suspension of deportation, the presiding inspector includes in his memorandum a discussion of the evidence relating to the alien's eligibility for such relief and states in numbered paragraphs his proposed findings of fact and conclusions of law in respect of such eligibility (id., 150.7(b)). The alien or his counsel is allowed a reasonable time in which to file exceptions to the proposed findings, conclusions, and order (id., 150.7(e)). The alien may request reopening of the hearing in a written application stating the grounds therefor (id., 150.8(a)). The alien may apply for suspension of deportation after the hearing has been closed in conjunction with a request that the hearing be reopened; such application must be addressed to the Board of Immigration Appeals after the record has been submitted to the Board (id., 150.8(b), 90.9).

deportation, is ordered deported without being accorded such procedural due process, the warrant of deportation can be challenged on this ground in habeas corpus proceedings.[8]

It appears from the record that at some stage of the deportation proceedings—just when was not clearly indicated in the habeas corpus petition (see *supra*, p. 4)—petitioner applied for suspension of deportation on the ground of economic hardship to his wife and family, and that the application was denied because he failed to establish good moral character during the preceding five years. The adverse determination of this issue was based on the fact that petitioner had been convicted in 1942 of acts of incest-rape. Even assuming that petitioner offered to prove to the immigration authorities that he was innocent of these crimes of which he stood convicted on his plea of guilty,[9]

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[8] Cf. *Kessler* v. *Strecker*, 307 U. S. 22, 34. It should be recalled, however, that petitioner does not question the fact of his deportability, but merely asserts that the discretionary power to suspend deportation was arbitrarily exercised. As the circuit court of appeals pointed out in this connection (R. 35), the pertinent language of 8 U.S.C. 155(c) is permissive in nature. It states that the Attorney General *may*, not that he must, suspend deportation under the circumstances named. Cf. *United States* v. *District Director of Immigration*, 120 F. 2d 762, 764-765 (C.C.A. 2); *United States* v. *Reimer*, 103 F. 2d 777, 778-779 (C.C.A. 2).

[9] As pointed out by the circuit court of appeals (R. 34), "It is not even clearly alleged [in the petition for a writ of habeas corpus] that [petitioner] offered at the administrative hearing to prove his innocence of the crime of which he had been convicted. The affidavits of the wife and daughter, annexed to the petition, attesting to Weddeke's innocence of the crime, were executed after the termination of the administrative proceeding and were, therefore, obviously not offered therein." The only statements in the habeas corpus petition from which it could be inferred that petitioner, allegedly, protested his innocence of these crimes to the immigration authorities are the statement that "In view of relator's offer to prove his innocence of the crime of which he was charged, this finding [of bad moral character] is unjust and arbitrary" (*supra*, p. 4) and the statement that he requested a stay of deportation (after the hearing was over and he had been ordered deported) in order to institute proceedings to "wipe out" his conviction, either by judicial proceedings in the court of conviction or by a pardon (*supra*, p. 4).

they were plainly justified in relying on the record judgment of conviction of a court of competent jurisdiction as proof of the facts attested by the conviction and in refusing to conduct what would in effect be a new trial of the charges. They may not have been bound to accept the conviction as conclusive proof of petitioner's guilt, as the court below indicated (R. 34), but they clearly did not act arbitrarily or capriciously in refusing to go behind it.

The petition for a writ of habeas corpus, it is true, alleged not only that petitioner was innocent of the crimes he was convicted of, but that his conviction was a nullity on constitutional grounds because he pleaded guilty without the advice of counsel, without expressly waiving the assistance of counsel, and in consequence of undue influence on the part of the prosecutor. But the petition did not allege—contrary to the definite implications of the petition for a writ of certiorari (Pet. 6-7, 8, 10, 17, 19, 24, 25), and as the circuit court of appeals pointed out (R. 34)—that petitioner offered to prove, at the hearing before the immigrant inspector prior to the issuance of the warrant of deportation, that his conviction was a nullity because he had been denied his constitutional rights. It was not even averred in the petition that the basis of petitioner's motion for a stay of deportation was the alleged nullity of his conviction on constitutional grounds. It was alleged that a stay of deportation was requested in order that petitioner might "open the proceedings" in the court of conviction or apply for a pardon, but not that the immigration authorities were ever apprised that he had hope of obtaining such judicial or executive relief on the ground that his conviction had been unconstitutionally procured. Even assuming, therefore, that it would have been an abuse of discretion on the part of the immigration authorities to have refused to go behind petitioner's conviction if he had challenged it before them as a constitutional nullity, the writ of habeas corpus

was properly dismissed without the taking of testimony because the petition for the writ did not allege that petitioner ever challenged his conviction on constitutional grounds at any stage of the deportation proceedings.

Nevertheless, with the circuit court of appeals (see R. 34-36), we shall assume, *arguendo*, that petitioner did attack his conviction in the deportation proceedings as a constitutional nullity, and that the habeas corpus petition so alleged. Even so, we submit, the writ was properly dismissed without the taking of testimony. We think the court below was clearly correct in saying that it would not have been arbitrary on the part of the immigration authorities to refuse to go behind the incest-rape conviction and to make an independent investigation both into the question of whether the conviction was unconstitutionally procured and whether, apart from that, petitioner was in fact innocent or guilty of the crimes charged. The immigrant inspector who conducts a deportation hearing is essentially an administrative official, though the hearing, it is true, does have quasi-judicial aspects.[10] Clearly, it seems to us, such an official is not equipped to conduct such a serious judicial function as that of inquiring into the grave constitutional questions which may be expected to arise in any proceeding in which the formal record judgment of a court of competent jurisdiction is collaterally attacked as a constitutional nullity. As was pointed out by the court below (R. 35-36), to hold that immigration authorities are under

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[10] The presiding inspector who conducts the hearing rules on all objections to the introduction of evidence and on motions made during the hearing. He also conducts the interrogation of the alien and the government witnesses, cross-examines the alien's witnesses, and presents such evidence as is necessary to support the charges in the warrant of arrest. (8 C.F.R., 1943 Cum. Supp., 150.6(b).) In the discretion of the officer in charge of the district where the hearing is held, however, a second immigrant inspector, known as the "examining inspector," may be designated to prosecute the charges, in which event the functions of the presiding inspector are mainly judicial (id., 150.6(n)).

a duty, when the constitutional validity of a judgment of conviction is challenged, to determine the truth of the allegations on which the collateral attack is based, would "greatly complicate administrative hearings in deportation cases; the presiding inspector and the Board of Immigration Appeals would have to inquire into what happened at the criminal trial and then decide what might be a difficult question of constitutional law, namely, whether what occurred at the trial amounted to a denial of constitutional rights and rendered the resulting judgment a nullity. That is certainly not a task lightly to be assumed by the Attorney General himself or to be imposed on the administrative officials in the Immigration Service."

We also think the court below was correct in holding (R. 36) that the immigration authorities did not abuse their discretion in denying petitioner's application for a stay of deportation after the warrant of deportation had been issued, in order to permit him to apply for a pardon or to institute some legal proceeding to set aside the judgment of conviction. As we indicated previously, there was no allegation in the habeas corpus petition that the motion for a stay of deportation was based on an alleged deprivation of constitutional rights which resulted in the conviction. Consequently, it cannot be assumed that the immigration authorities, in denying the motion, were cognizant of any such claim on petitioner's part. If, giving the allegations of the petition a liberal construction, it be assumed that petitioner did allege in his motion for a stay of deportation that he falsely pleaded guilty to crimes he did not commit, the immigration authorities clearly did not act arbitrarily in declining to grant the requested stay on petitioner's unsupported claim of innocence. It must be recalled that the incest-rape charges were brought by petitioner's own wife and daughter and that, so far as the record indicates, he spent some three years and three months in prison serving

his sentence without ever questioning the propriety and legality of his conviction. Nor is there any indication that his wife and daughter, who preferred the charges, ever took any steps to correct a wrong done by them. It is true that the wife and daughter now say that their charges were unfounded. But their statements to that effect, in addition to being obviously interested and bearing the hallmark of recent contrivance, were made just two days before institution of the present habeas corpus proceeding—more than five years after they brought the charges, nearly a year after petitioner's hearing before the immigrant inspector, more than six months after petitioner was finally ordered deported, and in fact some weeks after his motion for a stay of deportation was denied. Obviously, therefore, they cannot be considered in appraising the reasonableness of the immigration authorities' refusal to stay deportation. The regulation authorizing stays of deportation states that they may be granted where, deportation being imminent, "some serious emergency arises, or where new and material evidence is discovered" (8 C.F.R., 1943 Cum. Supp., 150.12(e)). Petitioner's now-claimed innocence of the crimes he was convicted of was obviously not "new and material evidence." If he is in fact innocent, it is something that he, his wife, and his daughter have known about from the beginning. We submit, therefore, that even assuming that petitioner averred in his application for a stay of deportation that he falsely pleaded guilty to crimes he never committed, the immigration authorities were well within the limits of sound discretion in declining to stay petitioner's deportation, since such an averment was manifestly one which, if true, could and should have been made much earlier.

2. Petitioner also contends that the deportation proceedings were unfair for the reasons that he was induced by

the presiding inspector at the hearing of December 5, 1946, to waive counsel, that the minutes of the hearing were falsified, and that his (subsequently-retained) counsel was refused permission to examine "the files" of the Immigration and Naturalization Service (Pet. 20-22). This contention, it is submitted, is also without merit.

(a) The contention in respect of having been induced to waive counsel has reference to the allegation in the habeas corpus petition that the presiding inspector indicated to petitioner that "it was not necessary to have counsel at the hearing and thereby induced [him] to proceed at the hearing * * * without counsel" (*supra*, p. 5). A statement that counsel was not required at the hearing, however, could scarcely have been misunderstood as meaning that counsel was not permitted. And it must be assumed that the inspector fulfilled his duty under the regulations (see fn. 4, p. 5) to apprise petitioner that he had a right to be represented by counsel if he so desired. If there was any intention of asserting in the habeas corpus petition that the inspector fraudulently induced petitioner to waive counsel by bringing undue influence to bear on him, or otherwise, the meaning surely could and should have been less equivocally expressed.

(b) The contention in respect of falsification of the minutes of the hearing evidently has reference to the allegation in the habeas corpus petition that petitioner's remark "yes" to the presiding inspector on being handed a probation officer's report meant merely that he would read the report, not that it was true, as the typewritten minutes of the hearing might be misconstrued to mean (*supra*, p. 5). If, however, as alleged, petitioner's "yes" meant merely that he would read the report and if it was taken from him before he did read it, it is surely not unreasonable to suppose that he would not have remained silent, but would

promptly have explained to the inspector that the latter had misunderstood his meaning. And the minutes of the hearing would have reflected such an explanation, unless the reporter who recorded the proceedings deliberately omitted it, which we do not understand petitioner intended to assert. Consequently, we think it clear that this allegation of the habeas corpus petition was insufficient to warrant the taking of testimony concerning the alleged incident.[11]

(c) The contention in respect of refusal to permit petitioner's counsel to examine "the files" of the Immigration and Naturalization Service evidently has reference to the allegation in the habeas corpus petition that petitioner's present attorney, who apparently was retained about October 24, 1947 (*supra*, p. 3) and certainly after October 13, 1947, when the application for a stay of deportation was denied, was not "given an opportunity of examining the record of the Immigration Service, although demand therefor has been made on October 24, 1947, except that" he did receive the minutes of the hearing of December 5, 1946, the findings of the presiding inspector, and the decision of the Board of Immigration Appeals (*supra*, pp. 5-6). This refusal, it was alleged (cf. R. 9 with Pet. 21), was unjustified in view of the provisions of 8 C.F.R., 1944 Supp., 95.6(b). This section provides that "During the time a case is pending the attorney or representative of record, or his associate, shall be permitted to review the record and, upon request, be lent a copy of the testimony adduced * * *." Under this regulation, counsel was not entitled to

[11] Petitioner's apparent suggestion that he was entitled to receive, on demand, a copy of the minutes of the hearing (*supra*, p. 5) is without merit. All that he was entitled to receive was a copy of the presiding inspector's memorandum containing his discussion of the evidence, proposed findings of fact and conclusions of law, and proposed order respecting deportation (8 C.F.R., 1943 Cum. Supp., 150.7(d)).

examine the "files" of the Service, but only the record of the deportation proceeding; and by his own admission, counsel did receive the record of the proceedings upon which the deportation warrant was based, i.e., the minutes of the hearing and the decision thereon.

Moreover, on October 24, 1947, on which date, allegedly, counsel was refused permission to examine the files of the immigration service, with the exceptions stated, petitioner's "case"—manifestly a reference to deportation or other administrative proceedings before the Immigration and Naturalization Service—was no longer "pending." Petitioner had had his hearing on December 5, 1946; he had been ordered deported on April 15, 1947; the Board of Immigration Appeals had affirmed the order and the warrant of deportation had been issued on April 18, 1947; and the application for a stay of deportation had been denied on October 13, 1947. There was no allegation in the habeas corpus petition that any steps in the deportation proceedings were taken after the last-mentioned date. Subsequent events pertained to judicial proceedings in habeas corpus. Consequently, the allegation now under consideration did not support an inference of unfairness in the deportation proceedings.[12]

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[12] Petitioner also urges that the judicial review provisions of the Administrative Procedure Act of 1946 (c. 324, 60 Stat. 237) apply to habeas corpus proceedings brought to test the legality of a deportation order (Pet. 14-19). His purpose in making the contention is merely to show that in judicial review of such an order "substantial evidence" and not merely "some evidence" must be found to support the order and that the administrative officials must be shown not to have acted arbitrarily. But since we have shown that the immigration authorities' determination that petitioner failed to establish his good moral character during the preceding five-year period was clearly based on substantial evidence and that they did not act arbitrarily, it is unnecessary to consider in this case to what extent, if at all, the act is applicable to deportation proceedings. Cf. *United States* v. *Watkins*, 73 F. Supp. 216 (S.D.N.Y.); see *United States ex rel. Trinler* v. *Carusi*, decided February 16, 1948 (C.C.A. 3).

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court and should therefore be denied.

Respectfully submitted,

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